No. 14513.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of the Appeal of

HENRY S. COHEN

From the Orders of the District Court Requiring Him to Represent Defendants Finn and to Appear *Amicus Curiae.*

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## OPENING BRIEF ON BEHALF OF HENRY S. COHEN, APPELLANT.

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## INTRODUCTORY.

This is an appeal by an attorney from the following two orders made, over his objection, in a *civil* case:[1] (1) An order requiring him to represent the defendants Finn in that action, the Finns having informed the Court and appellant that they did not want him to represent them but, on the contrary, that they desired to appear *in propria persona,* and (2) an order directing appellant to attend all pretrial hearings and the trial of the case as *amicus curiae* and to "assist these defendants (Finn) whenever they will permit."

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[1]No. 14309-WM-Civil, entitled "U. S. v. George C. Finn and Charles C. Finn, *et al.,*" now pending in the District Court at Los Angeles. (Judge Wm. C. Mathes.)

All references in this brief will be to the Reporter's Transcript unless otherwise expressly noted. Numerals refer to the page and, where used, the diagonal mark refers to the line. All italics herein are the writer's unless otherwise expressly noted.

## A.

## STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

One of the orders in question was made on August 23, 1954 [20/6; T. R.[2] 49], and the other was made on August 26, 1954 [28-29; T. R. 50]. Notice of appeal was filed on September 8, 1954 [T. R. 54].

The pleadings showing that the orders were made in a civil case are the Government's amended complaint [T. R. 2-17], the Finns' answer thereto [T. R. 18-24], and Charles Finn's cross-complaint [T. R. 25-36].

We contend that the District Court has no jurisdiction to compel an attorney to act as counsel for a litigant in a *civil* case.

The jurisdiction of the District Court to appoint counsel as *amicus curiae* is found in its inherent power. The exercise of this power is judicial.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, U. S. C., Section 1291.

Under the following authorities, the orders complained of are "final decisions" within the meaning of Section 1291.

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[2]"T. R." refers to Transcript of Record.

*United States v. Cefaratti* (C. C. A. D. C., 1952), 202 F. 2d 13, 91 App. D. C. 297, holds that the words "final decision" as used in Section 1291, are not to be used in a strict and technical sense but should rather be given a liberal and reasonable construction; that although an order is made in the course of an action, it has the finality that is required for appeal under that section if (1) it has a final and irreparable effect on the rights of a party, being a final disposition of a claimed right; (2) it is too important to be denied review; and (3) the claimed right is not an ingredient of the cause of action and does not require consideration with it.

In *Swift & Co. v. Campania Caribe* (1950), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, it was held that an order made pending the trial, dissolving an attachment on a ship, was appealable. There the Court said (p. 689):

> "Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible (citation). Under these circumstances the provisions for appeals only after final decision in 28 U. S. C., Sec. 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process."

In *Cohen v. Beneficial Loan Corp.* (1949), 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, it was held that an order made pending suit denying defendant's motion to require plaintiff to give security for reasonable expenses of defendant, was appealable. There the Court said (p. 546):

> "The effect of the statute (Section 1291) is to disallow appeal from any decision which is tentative, in-

formal or incomplete . . . But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken. . . . this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. *When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute (requiring defendants to post security), if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of the case. This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . . *We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.*"

In the present case, as in the *Beneficial Loan* case, *supra,* the orders unquestionably are a final disposition of, and have an irreparable effect on, appellant's rights which are separable from and not an ingredient of the main cause of action, and which do not require consideration with it. The orders are therefore appealable.

## B.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. The Thirteenth Amendment to the United States Constitution provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

3. *Section 1654, Title 28, United States Code,* provides:

> "In all courts of the United States, the parties may plead and manage their own causes personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

## C.

## STATEMENT OF FACTS.

Appellant is an attorney at law who, since 1922, has been and now is licensed to practice as such in all courts of the State of California, and in the United States District Court, Southern District of California, Central Division. Since 1936, appellant has maintained and now maintains offices at 704 South Spring Street, Los Angeles, with his son, Bernard B. Cohen, who is also an attorney.

On July 3, 1952, in the United States District Court at Los Angeles, the Government filed a civil suit entitled

"United States of America, Plaintiff, vs. George C. Finn, Charles C. Finn, *et al.,* Defendants," Action No. 14309-WM, in which the Government sought to recover damages for wrongful detention of an airplane which the Finns had bought from a school district which had previously purchased it from the Government. Subsequently, the Government filed an amended complaint which alleges, among other things, that the Government owns and is entitled to possession of the plane [T. R. 2-17]. Later, the Government seized the plane pursuant to the California Claim and Delivery Statutes [31/22 to 32/13]. On February 16, 1953, the Finns filed their answer in that case *in propria persona* [T. R. 18-24], and *they have never been represented therein by appellant or any other attorney.* On August 23, 1954, both Finns appeared *in propria persona* in Judge Mathes' court to resist the Government's motion to dismiss a cross-complaint [9/3; T. R. 25-36] which Charles Finn had filed in that action.

At the hearing, when the Court asked Charles Finn if they had an attorney, Charles said that they had no attorney in the civil case, that they were appearing *in propria persona* [10/17; see T. R. 49], that Bernard Cohen[3] was the Finns' attorney "in the criminal action" [10/22]. Charles also said, "Now, the Government has been sending correspondence to Bernard Cohen in regard to the civil action, and that is error because Mr. Cohen is not representing us in the civil action at all" [10/23 to 11/1].

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[3]Bernard Cohen is appellant's son who, with appellant, acted as co-counsel for the Finns in a criminal case which was tried in June, 1954, before Judge Edward P. Murphy in the United States District Court at Los Angeles [15/12-14]. The Finns were convicted and their appeal to this court is now pending. (See, *Finn v. United States,* No. 14479.)

When the Court asked who had sent word to the Court concerning the Finns' illness, Charles said, "That was Bernard Cohen"[4] [10/19-22].

During the course of the hearing, when Charles read a portion of a legal citation from a sheet of paper, the Court asked who gave it to him and Charles told the Court that appellant had given him that citation; whereupon, the Court said, *"Well, they aren't going to practice on the outskirts of this Court . . . They aren't going*

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[4]The motion to dismiss the Finns' cross-complaint was originally set to be heard on Monday, August 2, at 10 A. M. [3/3]. About 9:30 P.M. on Sunday, August 1, Dr. Frank Cutler, the Finns' physician, phoned Bernard Cohen at his home, told him that the Finns, who had been seriously ill, were convalescing in Palm Springs and were not well enough to be in court the following day; that he had prepared a letter to that effect and wanted appellant's son to pick it up at his office and deliver it to Government counsel so that the court hearing would be continued. About 7:30 A.M., the next day, Bernard Cohen picked up the letter [T. R. 47] at Dr. Cutler's office and at 8:45 A.M. phoned Government counsel, Mr. Abbott, told him the contents of the letter and stated that he would send it to him. Abbott stated that the letter was not acceptable and insisted that Dr. Cutler either make an affidavit or come to court to testify as to the Finns' condition [3/10-17]. Bernard Cohen then phoned Dr. Cutler, told him what Abbott had said, and Dr. Cutler stated he would be in court at 10:30 A.M. About 10 A.M., Dr. Cutler phoned Bernard Cohen at his office and said that he had been delayed by a patient, that he would be late to court and asked Mr. Cohen to notify the court to that effect. Bernard Cohen then phoned the Court's Secretary and told her that Dr. Cutler would be in Court at 11 A.M. [3/20-23]. Bernard Cohen did not appear in court that day, nor has he ever at any time appeared for or represented either of the Finns in the civil case. In fact, that day, the Court asked Abbott, "Are these defendants Finn represented by counsel in this civil action?" And Abbott replied: "Mr. Cohen has represented them in separate criminal action, but *not in the civil action. He told me this morning he was communicating in this matter as a matter of courtesy and not as representative of them in the civil action"* [4/6-12]. See, Minutes of Court dated Aug. 2, 1954, stating there was *"no appearance"* for defendants [T. R. 46].

*to practice law in this Court by indirection,*[5] and I will order that they come in and appear on this cross-complaint and I will hear them argue this motion. They aren't going to argue it by remote control" [15/8-19]. When the Court stated it intended to continue the matter for that purpose and asked Charles what date he wanted, Charles said, "That I do not know. I wouldn't know what their cases were; their future calendar is" [15/23], and when Charles attempted to speak further, the Court said, "Usually the lawyer speaks for the client. I am not going to permit a member of the bar of this Court to have his client come in here speaking for the lawyer" [16/3-5]. Charles then said, "Mr. Cohen did not enter the case," and the Court replied, "He has entered it now. *When he gave you that book*[6] *he entered it"* [16/6-8]. Charles suggested that the matter be continued for two weeks "inasmuch as Mr. Cohen must be advised of this," but the Court said, "He will be advised in a hurry. The United States Attorney will tell him to be here next Monday morning" [16/13-16]. After further discussion about dates, the Court continued the matter to Thursday, August 26, and said, "Mr. Henry Cohen and Mr. Bernard Cohen, one or both of them are to be here. If they both want to appear, why, they are both at liberty to appear. *If you*

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[5]We know of no canon of ethics, or Federal or other Rule or Statute which declares or even remotely indicates that an attorney who merely gives a legal citation to a lay person, thereby practices law by "indirection," or on the "outskirts" of the court, or that such conduct on his part is in any way unethical or improper.

[6]The Court's assumption that Charles had read from a book and that appellant had given it to him was erroneous. Actually, Charles merely read from a scrap of paper on which was written a legal citation which appellant had given him several months previously. Appellant did not at any time give either of the Finns any books whatever. [See, 30, 31.]

*wish to choose one of them among them to appear, that may be done. One of them will serve as attorney in this case"* [17/9-13].

About noon the same day, Mr. Abbott, the Government's attorney, telephoned appellant at his office, informed him of the Court's order and suggested that he appear in Judge Mathes' court at 2 P.M. that afternoon, which appellant did. At that time, appellant told the Court that when appellant and his son had represented the Finns in a contempt case[7] heard by Judge Westover, appellant and his son had informed Judge Westover that neither appellant nor his son ever represented the Finns in the civil case [18/9-13]. The Court then said, "Well, Mr. Cohen, I will just make it very brief. *I never like to see any layman trying to try a lawsuit* . . . he (Charles) was giving me learned dissertations on the law . . . and he told me that you or your son Bernard were the source of it. So I was quick to seize upon your familiarity with the case to appoint you, you or your son; and it doesn't matter which it is" [18/14 to 19/1]. When appellant tried to offer an explanation, the Court interrupted with, "Well, you will have plenty of opportunity to try the case" [19/3], and when appellant asked permission to reply, the Court said, "No, there is no reply. *Do you want to serve yourself, or do you want your son to serve?"* [19/6]. And when appellant said, *"We are compelled to take a case we don't want and can't possibly represent, either one of us, to do those boys justice. I know absolutely*

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[7]About 17 months previously, to wit, in March, 1953, appellant and his son were co-counsel who represented the Finns in a *criminal* contempt trial which was based upon their alleged violation of a certain restraining order. Judge Westover, who heard the case without a jury, acquitted the Finns. [See, T. R. 37-42.]

*nothing about the civil case"* [19/9], *the Court replied, "You will before it is over . . . This Court is entitled to call upon you and your son for assistance.* I don't care to appoint both of you . . ." [19/12-17]. Appellant then stated that he was "perfectly willing to help the boys, but not in the trial of the case," and then added, "I would rather take it before my son because he can't possibly do it. *I want the record to show it is over my objection"* [19/18-24].

The Court then said, *"You are hereby appointed to represent Charles C. Finn and George C. Finn in case No. 14309 . . . I shall expect you, of course, to do the same as you would if you had a retainer"* [20/6-19].

See, Minutes of the Court dated August 23, 1954 [T. R. 49], appointing appellant "to represent Defendants Finn."

Following that, Government counsel inquired through the Court if August 27 was a convenient time for appellant to attend a conference of counsel which was required by an order the Court had previously made. When appellant stated in substance that he was not familiar with such conferences, the Court said, "Perhaps if you go to the conference you can learn something. There is no requirement that it has to be concluded in a single conference. *You may have to have a dozen conferences"* [21/14]. The Court then directed appellant to appear in Court on August 26 "to argue this motion of the Government to dismiss the cross-complaint" [21/8].

On August 26, in obedience to the Court's order, appellant appeared in Court, and at that time the Finns, who were also present, filed an affidavit stating that *"they do not wish to be represented by Henry S. Cohen*

*or Bernard B. Cohen, . . . that representation by any counsel not of their own choosing would be a violation of their Constitutional rights" and that they "choose to appear in propria persona"* in the civil case [24/17 to 25/3; T. R. 52].

When appellant asked permission to make a statement supplementing the Finns' affidavit, the Court said, *"It won't do you any good. . . . You are in this case and you are going to stay here; irrespective of what the Finns say, you are going to stay here"* [25/5-7]. Appellant then said, *"I happen to be 75 years old. This case is going to take hundreds of hours. I won't give my life for George Finn or Charles Finn."* Following that, the Court said, *"Do you want your son to come in here?" And when appellant said "No," the Court said, "All right. You are here"* [25/19, to 26/1].

Appellant then attempted, unsuccessfully [25/8], to read a document which the Court ordered filed [26/19] and which is as follows:

"August 26, 1954

"Your Honor, I am present in court at this time in obedience to the order your Honor made last Monday. However, I want to inform the court that since last Monday the defendants have told me that they do not desire to have me represent them in this case, and that they wish to represent themselves.

"I ask that your Honor vacate the order your Honor made last Monday, and that the court relieve me from acting as their attorney in this case on the following grounds:

"First: I respectfully submit—with due deference to your Honor—that the court had no power to make the order requiring me to represent the defendants, when they had not retained me.

"SECONDLY: To compel me to act as their lawyer contrary to their desires would be violative of their right to due process of law guaranteed by the Fifth Amendment of the Federal Constitution, and would be violative of their right to represent themselves, which is a Constitutional right of every citizen of the United States" [26/23, to 27/19; T. R. 53].

After reading the above document, the Court acknowledged the fact that the Finns had the right to appear *in propria persona* [28/3] and when the Court added, *"But you are here as an officer of the court and you will stay here as a friend of the court and assist the court in this civil litigation,"* appellant replied, *"Your Honor, I will be glad to. But your Honor couldn't expect me to spend hundreds of hours as a friend of the court when I have other affairs to take care of, and I cannot officially represent these boys . . ."* [28/6-12].

Appellant then asked the Court to rule on his motion to vacate the order of August 23, and his request for leave to withdraw as the Finns' attorney [28/18], whereupon the following occurred:

"The Court: The Court has ruled. You are here as a friend of the court.

Mr. Henry Cohen: And not representing the Finns?

The Court: *Only to the extent they permit you to.* My experience has been, and we have it here quite frequently in criminal cases, these people who think they want to represent themselves, *if an attorney is available, before very long the attorney is representing them* because they are in water over

their head all the time and they soon discover it, if they have any interest in their lawsuit. . . . * * *

Mr. Henry S. Cohen: . . . So that I understand my position, what your Honor said, I am not required to be here every day to argue this, or —I am talking about the civil case.

The Court: I am speaking about it. *You will be here throughout this civil case as amicus curiae,—*

Mr. Henry S. Cohen: Against my wishes?

The Court: *—and you will assist these defendants whenever they will permit,* and—

Mr. Henry S. Cohen: *Sit here every day?*

The Court: *When it is here.*

Mr. Henry S. Cohen: Just merely present in court?

The Court: You will be helping the court, I trust. You are an officer of this court. *If you wish to remain an officer of this court I trust you will help the court to the best of your ability.*

Mr. Henry S. Cohen: I am going to repeat, I know nothing of the case, and what—

The Court: You can learn about the case.

Mr. Henry S. Cohen: May I make a record?

The Court: You have said all you have to say.

Mr. Henry S. Cohen: *I want to say it is all over my objection.*

The Court: The record will show that every minute of the trial that you are here is over your objection" [28/20, to 30/7].

See, Minutes of the Court dated August 26, 1954 [T. R. 50], wherein the Court orders appellant "to appear in this case as *amicus curiae* at all hearings herein."

Thereafter, when George Finn made a statement regarding a legal point with which the Court did not agree, the Court said, "'A little learning is a dangerous thing,' as the poet said. And you are confusing two entirely different things. If I had time I would try to straighten it out for you, but it is 12:00 o'clock. *Perhaps Mr. Cohen will*" [45/12-15]. And when George continued with his legal argument, the following occurred:

> "The Court: Did you ever read Byron's version on 'A little learning is a dangerous thing'?
>
> Mr. George C. Finn: No, sir but I understand it.
>
> The Court: *You talk it over with Mr. Cohen. He will explain it to you*" [46/1-5].

The Court made an order continuing the pretrial hearing to October 25, 1954 [39/9], and directed that *"You gentlemen hold those meetings and proceed as far as you can under the pretrial procedure"* [46/25, to 47/1]. The date for the trial of the case has not as yet been set.

The Court has never vacated its order of August 23, wherein it appointed appellant to act as attorney for the Finns, or its order of August 26, wherein it appointed appellant *amicus curiae,* and those orders are still in full force and effect.

In obedience to the orders of Court discussed above, appellant was required to and did perform the following services in the civil case to the date of drafting this brief:

(1) August 27—10:30 A.M., appearance at Room 229, Federal Building, Los Angeles, to attend conference of

attorneys representing the Government and certain defendants. Total time, 1 hour, 20 minutes (10:30 to 11:50 A.M.).

(2) The same day, August 27—3 P.M., appearance at the same place to attend another conference of attorneys representing the Government and certain defendants. Total time, 1 hour, 15 minutes (3 to 4:15 P.M.).

> (NOTE: Both Finns attended both conferences mentioned in sub-paragraphs (1) and (2) above, but did not at any time call upon appellant to assist or advise them in any manner whatever. On the contrary, *the Finns stated in the presence of all counsel in attendance that they were capable of handling the conference themselves.*)

(3) September 3—9 A.M., appearance at the same place, to attend the Government's taking of the deposition of Mr. Lanham, an officer of one of the corporate defendants. Only appellant, Mr. Abbott who is Government counsel, and the reporter were present, and appellant waited until 9:45 expecting Lanham to arrive. At 9:45, Abbott said he understood that Lanham failed to appear because his attorney claimed that no subpoena had been served on Lanham. When Lanham did not appear, appellant and Abbott left at 9:45 A.M. Total time, 45 minutes. *Neither of the Finns appeared at all on this occasion.*

(4) The same day, September 3—2 P.M., appearance at the same place, to attend the Government's taking of the deposition of Mr. Batchelor, an officer of one of the

corporate defendants. Appellant was present during the entire proceedings but took no part therein. Total time, 1 hour, 40 minutes (2 to 3:40 P.M.). *Neither of the Finns appeared at all on this occasion.*

(5) September 10—10 A.M., appearance at the same place to attend another conference of attorneys. Total time, 1 hour, 30 minutes (10 to 11:30 A.M.).

(6) The same day, September 10—1:30 P.M., appearance at the same place to attend another conference of attorneys. Total time, 2 hours (1:30 to 3:30 P.M.).

## D.

## SPECIFICATION OF ERRORS RELIED ON.

1. The Court had no power or jurisdiction to make the order of August 23, 1954, requiring appellant to act as attorney for the Finns in the civil case.

2. The Court had no power or jurisdiction to make the order of August 26, 1954, appointing appellant *amicus curiae* when the obvious purpose and effect of such order was and is to compel appellant to act as the Finns' attorney.

3. The orders violate the Thirteenth Amendment to the United States Constitution which prohibits involuntary servitude.

4. The orders violate due process of law guaranteed by the Fifth Amendment to the United States Constitution.

## E.

## SUMMARY OF ARGUMENT.

I. The Court had no power or jurisdiction to make the order of August 23, requiring appellant, over his objection, to act as the Finns' attorney in the civil case, when the Finns informed the Court that they did not want him to represent them and that they desired to appear *in propria persona.*

II. The Court had no power or jurisdiction to make the order of August 26, appointing appellant, over his objection, as *amicus curiae* in the civil case, when the obvious purpose and effect of the order was and is to compel appellant to act as the Finns' attorney if and when they desire or permit him to do so.

III. The orders which require appellant, over his objection, to perform legal services for the Finns, if and when they desire or permit him to do so, violate the Thirteenth Amendment to the United States Constitution, which prohibits involuntary servitude.

IV. The orders which require appellant, over his objection, to perform legal services for the Finns, if and when they desire or permit him to do so, deprive appellant of his liberty and property without due process of law guaranteed by the Fifth Amendment to the United States Constitution.

## ARGUMENT.

### I.

### The Court Had No Power or Jurisdiction to Make the Order of August 23, Requiring Appellant, Over His Objection, to Act as Attorney for the Finns in the Civil Case, When They Informed the Court That They Did Not Want Appellant to Represent Them and That They Desired to Appear in Propria Persona.

The Finns advised the Court that they had no attorney in the civil case [10/25], that "Mr. Cohen did not enter the case" [16/6], and that they were appearing *in propria persona* [10/18]. They also filed an affidavit stating that they did not wish to be represented by appellant or his son and that they chose to appear *in propria persona* [24/17; T. R. 52].

*Section 1654, Title 28, U. S. C.* provides:

> "In all courts of the United States, the parties may plead and manage their own causes personally or by counsel as by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

*Bocz v. Hudson Motor Car Co.* (D. C. Mich., 1937), 19 Fed. Supp. 385, 386, holds that "everyone has a right to appear in his own proper person and represent himself."

*Cooke v. Swope* (D. C. Wash., 1939), 28 Fed. Supp. 492, 493, aff. 109 F. 2d 955, and *Bankey v. Sanford* (D. C. Ga., 1947), 74 Fed. Supp. 756, 757, aff. 165 F. 2d 788, cert. den. 333 U. S. 847, 92 L. Ed. 1130, 68 S. Ct. 649, hold that the Court cannot force counsel upon a litigant.

*Roberts v. Anderson* (10th Cir., 1933), 66 F. 2d 874, 876 holds that in any case, civil or criminal, a refusal to permit a party to appear with an attorney of his own

choice "would be a denial of a hearing, and therefore, of due process in the constitutional sense."

See, also, *Swartz v. Swartz* (Tex. Civ. App., 1934), 76 S. W. 2d 1071, 1072; *Arnold v. Fort Worth & D. S. P. Ry.* (Tex. Civ. App., 1928), 8 S. W. 2d 298, 301.

**1. Even if the Finns Had Desired Counsel, the Court Had No Power to Appoint Appellant to Act as Their Attorney.**

At the outset it should be noted that although the Sixth Amendment to the U. S. Constitution, Rule 44 of Fed. Rules of Crim. Procedure, and Section 3005 of Title 18 U. S. C. give defendants in *criminal* cases the right to assistance of counsel, no comparable Constitutional provision, Rule or Statute affords the same right to litigants in *civil* cases.

In *11 Cyclopedia of Fed. Proc., p. 44,* in discussing the right to the assistance of counsel as provided for in the Sixth Amendment, Federal Rules and Statutes, the writer states:

> "The right to assistance of counsel does not exist in civil or quasi-criminal proceedings."

*Brown v. Johnston* (9th Cir., 1937), 91 F. 2d 370, holds that since a habeas corpus proceeding is not a "criminal prosecution" within the Sixth Amendment, an indigent prisoner involved therein is not entitled to counsel as a matter of right.

*Martino v. Holzworth* (8th Cir., 1947), 158 F. 2d 845, holds that in an action for a penalty, although designated quasi-criminal, a defendant is not entitled to assistance of counsel within the provisions of the Sixth Amendment.

Clearly, the Court had no power or jurisdiction to make the order of August 23, appointing appellant as attorney for the Finns.

## II.

## The Court Had No Power or Jurisdiction to Make the Order of August 26th, Appointing Appellant, Over His Objection, as Amicus Curiae and Requiring Him to Attend All Hearings, Pretrial Proceedings, and the Trial of the Civil Case, When the Obvious Purpose and Effect of Such Order Was and Is to Compel Petitioner to Act as the Finns' Attorney if and When They Desire or Permit Him to Do so.

### 1. The Sole Function of Amicus Curiae Is to Render Aid to the Court, Not a Litigant.

In *Broome v. Smith* (Tex. Civ. App., 1954), 265 S. W. 2d 897, 899 the Court said:

> ". . . the office of *amicus curiae* could *not be subverted to aid a litigant,* but is restricted to the office of helping the *court only.*"

In *Olcott v. Reese* (Tex. Civ. App., 1927), 291 S. W. 261, the Court said:

> "Clearly the office of *amicus curiae* is to aid the court, and *cannot be subverted to the use of a litigant in the case.* Though the judgment recites that . . . Bland appeared as *amicus curiae,* the facts show that his appearance was that of an interested party."

In *McGhee v. Southwest Industries Co.* (Tex. Civ. App., 1927), 298 S. W. 609, 612, the Court said:

> "This office (of *amicus curiae*) is to aid the *court* and for its personal benefit, and *cannot be subverted to the use of a litigant in the case.*"

In *Clark v. Sandusky* (7th Cir., 1953), 205 F. 2d 915, 917, the Court said:

> "An *amicus curiae* is 'not a party to the action, but is merely a friend of the court whose *sole* function is to advise, or make suggestions to, the *court.*' "

In *Givens v. Goldstein* (D. C. Mun. App., 1947), 52 A. 2d 725, 726, the Court said:

> " 'He (*amicus curiae*) is,' as we have pointed out before, 'not a party to the action, but is merely a friend of the court whose *sole* function is to advise, or make suggestions to, the *court.*' "

In *The Claveresk* (2d Cir., 1920), 264 Fed. 276, 279, the Court said:

> "The phrase *amicus curiae* means one who gives information to the *court* on some matter of law in respect of which the court is doubtful."

In *Kemp v. Rubin* (1946), 64 N. Y. S. 2d 510, 512, 187 Misc. 707, the Court said:

> ". . . the function of an *'amicus curiae* is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration . . . he is not a party, and *cannot assume the functions of a party;* he must accept the case before the court with issues made by the parties, *and may not control the litigation.*"

*Bouvier's Law Dictionary* defines *"amicus curiae"* as follows:

> "A friend of the court. One who, for the assistance of the *court* gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recol-

lect . . . *But it is not the function of amicus curiae to take upon himself the management of the cause.*"

*Sunderland Cases and Materials on Judicial Administration,* page 170, is as follows:

> "An *amicus curiae* is a person who volunteers, in an action in which he is not directly involved, to give suggestions or advice to the *court* upon some matter pending before it, in order that it may not be led into error. Sometimes the *amicus curiae* is invited by the court to make suggestions, in the form of submitted briefs or otherwise, upon matters of public interest in which the court is called upon to deal."

In *State v. Bonner* (Mont., 1950), 214 P. 2d 747, 751, the Court said:

> "An *'amicus curiae'* literally meaning a friend of the court, is a person, whether attorney or layman, who, as a stander-by, when a judge is doubtful or mistaken, may upon leave granted in a case then before him, inform the *court* as to facts and situations that may have escaped consideration or remind the *court* of legal matter which has escaped its notice and regarding which it appears to be in danger of going wrong."

**2. The Purpose and Effect of the Order Was and Is to Compel Appellant to Perform Legal Services for the Finns.**

Although the Court designated appellant *"amicus curiae,"* in the order of August 26, it is perfectly clear that the purpose and effect of the order in question was and is to compel appellant to perform legal services for the Finns. This is manifest from the following:

(a) The Court said to Charles, "Mr. Henry Cohen and Mr. Bernard Cohen, one or both of them are to be here. If they both want to appear, why, they are both at liberty to appear. *If you wish to choose one of them among them to appear, that may be done. One of them will serve as attorney in this case*" [17/9-13].

(b) Later, when appellant told the Court that neither he nor his son ever represented the Finns in the civil case, the Court said, "Well, Mr. Cohen, I will just make it very brief. *I never like to see any layman trying to try a lawsuit* . . ." [18/14].

(c) The Court also told appellant, "You are hereby appointed to represent Charles C. Finn and George C. Finn in case No. 14309 . . . *I shall expect you, of course, to do the same as you would if you had a retainer*" [20/6-19].

(d) In discussing a pretrial conference of attorneys and the Finns, which was scheduled to take place, the Court said to appellant, "Perhaps if you go to the conference you can learn something. There is no requirement that it has to be concluded in a single conference. *You may have to have a dozen conferences*" [21/14-17].

(e) When appellant asked for a ruling on his motion to vacate the order of August 23 the Court said, "The Court has ruled. You are here as a friend of the court" [28/18-21]. And when appellant asked whether he would be representing the Finns, the Court said, *"Only to the extent they permit you to.* My experience has been, and we have it here quite frequently in criminal cases, these people who think they want to represent themselves, *if an attorney is available before very long the atorney is representing them* because they are in water over their head . . ." [28/22 to 29/4].

(f) The Court also told appellant, "You will be here throughout this civil case as *amicus curiae* . . . and *you will assist these defendants whenever they will permit* . . ." [29/12-16].

(g) Later, while George was discussing some law, the Court said, ". . . you are confusing two entirely different things. If I had time I would try to straighten it out for you, but it is 12:00 o'clock. *Perhaps Mr. Cohen will*" [45/12-15].

(h) Still later, when George continued with his legal argument, the following occurred:

> "The Court: Did you ever read Byron's version on 'A little learning is a dangerous thing'?
>
> Mr. George C. Finn: No, sir, but I understand it.
>
> The Court: *You talk it over with Mr. Cohen. He will explain it to you*" [46/1-5].

The above authorities make it clear that an *amicus curiae* is one whose *sole* function is to aid the *Court,* not a litigant. Since the *only* function of an *amicus curiae* is to aid the *Court,* it logically follows that a judge has no power or jurisdiction, under the guise of appointing an attorney as *amicus curiae,* to compel the attorney to perform legal services for a litigant in a civil case.

Thus, in the present case, the Court had no power or jurisdiction, under the guise of appointing appellant as *amicus curiae,* to compel him to attend all hearings, pretrial proceedings, and the trial of the case, when the real purpose and effect of that order was and is to require appellant to represent the Finns *"to the extent they permit you to"* [28/23], and to compel appellant to *"assist these defendants whenever they will permit"* [29/15].

## III.

## The Orders Which Require Appellant, Over His Objection, to Perform Legal Services for the Finns, if and When They Desire or Permit Him to Do so, Violate the Thirteenth Amendment to the United States Constitution Which Prohibits Involuntary Servitude.

*Arthur v. Oakes* (7th Cir., 1894), 63 Fed. 310, 317, 11 C. C. A. 209, holds:

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such restraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction."

*Heflin v. Sanford* (5th Cir., 1944), 142 F. 2d 798, 799, holds:

> "Whether appellant was to be paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does it is not justification for forced labor."

*Black's Law Dictionary* defines "involuntary servitude" as:

> "The condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not."

*Henderson v. Coleman* (1942), 150 Fla. 185, 7 So. 2d 117, holds that where there is no contractual relation between a union and a truck operator, an injunction re-

quiring union members to load trucks of such operator would violate the Florida constitutional provision against "involuntary servitude."

> (NOTE: The Florida constitutional provision is substantially the same as the Thirteenth Amendment to the United States Constitution.)

It is elementary that a lawyer, like persons engaged in other businesses and professions, has the Constitutional right, in the absence of Statute or Rule of Court, to select those individuals for whom he desires to render his personal services. As was said in *Adair v. United States* (1907), 208 U. S. 161, 173, 28 S. Ct. 277, 52 L. Ed. 436, "'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice . . .'"

To our knowledge, the only provisions which relate to the appointment of counsel for litigants in Federal courts are those found in the Sixth Amendment to the United States Constitution, Rule 44 of Federal Rules of Criminal Procedure, and Section 3005 of Title 18, United States Code, and those provisions relate only to the rights of defendants in *criminal* cases to the assistance of counsel. The fact that no comparable Constitutional provision, Rule or Statute affords the same right to litigants in *civil* cases, and that the authorities hold that the right to assistance of counsel does not exist in civil or quasi-criminal proceedings (11 Cyc. Fed. Proc., p. 44, and cases cited), is a strong indication that the courts have never had the power to compel any attorney, against his will, to render services for a party to a *civil* action.

It follows that the orders in question which require appellant, over his objection, to perform legal services for the Finns if and when they desire or permit him to do so, place appellant in a condition of involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution.

## IV.

## The Orders Which Require Appellant, Over His Objection, to Perform Legal Services for the Finns, if and When They Desire or Permit Him to Do so, Deprive Appellant of His Liberty and Property Without Due Process of Law in Violation of the Fifth Amendment to the United States Constitution.

Appellant stated "that the court had no power to make the order requiring me to represent the defendants, when they had not retained me" [27/9-12]. And when the Court, over appellant's objection [19/24; 30/4]; made an order appointing him as attorney for the Finns, the Court said, *"I shall expect you, of course, to do the same as you would if you had a retainer"* [20/18].

In *Adair v. U. S.* (1907), 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436, in discussing the provisions of the Fifth Amendment declaring that no person shall be deprived of liberty or property right without due process of law, the Court said (p. 172):

> *"Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor . . ."*

In *Adkins v. Children's Hospital* (1923), 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, the Court said (p. 545):

> "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment) is settled by the decisions of this court and is no longer open to question (citations). Within this liberty are contracts of employment of labor."

In *Morehead v. N. Y. ex rel. Tipaldo* (1936), 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, the Court said (p. 610):

> "The right to make contract about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid."

See, also, *Coppage v. Kansas* (1914), 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441; *Fischer v. Richard Gill Co.* (Tex. Civ. App., 1952), 253 S. W. 2d 915, 918; *Green v. Samuelson* (1935), 168 Md. 421, 178 Atl. 109; *Commonwealth v. Boston Transcript Co.* (1924), 249 Mass. 477, 144 N. E. 400.

It seems clear that a lawyer, like anyone else, has the Constitutional right, in the absence of some Statute or Rule of Court, to use his own discretion in selecting those individuals for whom he desires to render his services. And if he has that right, he certainly has the privilege, in the absence of some Statute or Rule of Court, to make his own contracts for the sale of his own services.

As we pointed out in Section III above, the fact that the Sixth Amendement to the Constitution, Rule 44 of Fed. Rules of Crim. Proc., and Section 3005 of Title 18,

U. S. C., give to defendants in *criminal* cases the right to assistance of counsel, and that there is no comparable Constitutional provision, Rule or Statute which affords the same right to litigants in *civil* cases, is a strong indication that the Courts have never had the power to compel an attorney, against his will, to render services for a party in a *civil* action.

It follows that the orders in question which require appellant, over his objection, to perform legal services for the Finns if and when they desire or permit him to do so, deprive appellant of his liberty and property without due process in violation of the Fifth Amendment to the United States Constitution.

## CONCLUSION.

Appellant, who will be 75 years old on his next birthday [25/21], is engaged in a one-man law practice which requires his full time and attention. Although he maintains offices with his son, they are not partners, and appellant has no law clerk or other assistant to aid him in handling the many cases and other matters now pending in his office. With the exception of the Finn *criminal* case[8] mentioned above and a few bankruptcy matters, appellant has represented no litigants in the past 20 years who were parties in cases pending in the U. S. District Court, and appellant is not famliar with the practice or procedure now followed in that court.

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[8]In the Finns' criminal case, appellant did not examine any of the witnesses, make any objections, or present any arguments to the court or jury, nor did he take any active part in the trial of that case, except to assist his son at the counsel table.

In affiant's opinion, the preparation and trial of this case will involve hundreds of hours of work on appellant's part, and he so informed the trial court [25/21; 28/10]. Appellant respectfully submits that it is extremely burdensome, unfair and unjust, under the circumstances here involved, to compel him to comply with the orders in question.

For many reasons stated in this brief, appellant requests that said orders, and each of them be reversed, vacated and set aside.

Respectfully submitted,

HENRY S. COHEN,

*In Propria Persona.*